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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

Nos. 71-1509; 71-1612

UNITED STATES OF AMERICA,
Appellant

vs.

JAMES JIM, ET AL.,
Appellees

and

STATE OF UTAH, ET AL.,
Appellants

vs.

JAMES JIM, ET AL.,
Appellees

FOR REHEARING

PETITION ~~TO VACATE PER CURIAM DECISION AND TO GRANT APPELLEES A HEARING AND BRIEF IN SUPPORT THEREOF~~

JOSEPH S. JONES
JACK LUNT
800 Walker Bank Building
Salt Lake City, Utah 84111

GRANT H. BAGLEY
CLIFFORD L. ASHTON
141 East 1st South
Salt Lake City, Utah 84111

BRYCE E. ROE
340 East 4th South
Salt Lake City, Utah 84111
Attorneys for Appellees

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PETITION TO VACATE PER CURIAM DECISION AND TO GRANT APPELLEES A HEARING

Appellees petition the Court to vacate the Per Curiam decision reversing the judgment appealed from and to set the case down for oral argument and hearing. The petition is based upon the grounds that:

1. The decision denies the Appellees procedural due process in that it summarily disposed of the action without giving Appellees any opportunity to be heard or even to present full briefs on the matter, and without any consideration of Appellees' case and the prior relevant decisions of the Court.

2. The Court has not adjudicated all the substantial issues of the case.

3. The Court's determination that Appellees' interest in 37½% of the royalties from oil and gas leases on the Aneth Extension, 47 Stat. 1418 (the "1933 Act"), is not protected by the Constitution is in error because:

(a) it ignores the relevant provisions of the 1933 Act.

(b) it ignores the unchallenged findings of the lower court;

(c) it is in conflict with prior decisions of the Court.

ARGUMENT

I. THE PER CURIAM DECISION DEPRIVES THE APPELLEES OF PROCEDURAL DUE PROCESS

In response to the written request of the Court, the Appellees filed a motion to affirm the judgment. No alternative motion to dismiss was filed because it was clear that the Court had jurisdiction of the appeals and that Appellants had complied with the rules of the Court and conformed to the statute relating to appeals.

Without hearing any oral argument and without giving Appellees any opportunity to present a brief other than in support of its motion to affirm, the Court has summarily reversed the judgment in a manner which appears to be contrary to the stated policy of the Court in deciding matters without oral hearing (see Rule 45). Because of their minority and primitive status, Appellees' claim should be given full and complete consideration.

We submit that the case presents very serious problems with respect to the property rights of communities of primitive Indians who deserve more than a summary reversal of their cause. The procedure followed by the Court in a case of this kind is unprecedented so far as we can determine. The right to be heard is a fundamental right and should not be denied, particularly where the parties involved are primitive Indians who are without the knowledge, resources or political power to have their rights and needs known through the legislative process.

II. THE COURT HAS NOT ADJUDICATED ALL SUBSTANTIAL ISSUES IN THE CASE

The only motion before the Court was a motion to affirm the judgment of the lower court. Had the motion

been granted, no further issues would be before this Court. But by a premature reversal on the merits, a serious issue remains which the Court has not had an opportunity to consider; that is, whether the funds accrued from the 37½% royalty fund at the time of the enactment of the 1968 Amendment can be expended only for the benefit of Appellees.

At the time of this Court's decision, counsel for all parties had agreed upon and were in the process of preparing an "Abstract of Minutes and Financial Statements of Defendant Utah Board of Indian Affairs" which indicated that as of June 30, 1968 the amount of the 37½% royalty fund accrued but unexpended and uncommitted was approximately $5,760,000.00. The 1968 Amendment became effective on May 17, 1968.

This question was not adjudicated by the lower court because counsel for Appellants had not, at the time of reversal by this Court, filed an accounting ordered by the lower court. Appellees respectfully request an opportunity to present the question of whether the money from the 37½% royalty fund accrued at the time of the 1968 Amendment can be expended only for the benefit of Appellees by oral argument and written brief to the Court.

III. THE COURT'S DECISION IGNORES RELEVANT PROVISIONS OF THE 1933 ACT

The per curiam opinion stating that the 1933 Act did not create constitutionally protected property rights in the Appellees rests upon the conclusion that the Act vested the title to the Aneth Extension lands and all

royalties resulting therefrom in the Navajo Indian Tribe for the benefit of the members of that Tribe. This interpretation of the Act is unwarranted and is contrary to its plain terms.

The Navajo Indian Tribe is not mentioned in the 1933 Act as the beneficiary of the 37½% royalty fund. The withdrawal of the lands within the Aneth Extension was "for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon." The Secretary has not settled any Indians on the Extension, and the grantees under the Act are the Indians thereon—the Appellees herein. There are many members of the Navajo tribe who live off the reservation in San Juan County, Utah and also many who live on the part of the reservation in the State of Arizona. Manifestly, the withdrawal of the Aneth Extension lands was not intended by Congress to be for their benefit. The Appellees were the Indians "thereon" when the Act was passed and they are the only grantees designated in the Act. There are approximately 85,000 members of the Navajo Tribe; approximately 1,500 of whom live on the Aneth Extension and approximately 13,500 of whom reside in San Juan County, Utah on lands not on the Aneth Extension or the Navajo Reservation.

The Court's decision is inherently contradictory. While it holds that the title to the royalties is not in those who reside on the Aneth Extension (Appellees herein) but in the Navajo Tribe, the Court also holds that the class entitled to 37½% of the royalties is not the Navajo Tribe nor the class named in the Act creating the Aneth Extension, but an arbitrary class: all Navajo Indians residing in San Juan County, Utah; a class, 90% of

which does not reside on any part of the Aneth Extension or the Navajo Indian Reservation; a class which is significantly larger than the class of Indians residing on the Aneth Extension which produces the oil and gas from which the royalties come; a class which is significantly smaller than the Navajo Tribe. The definition of the class given the benefits of the 37½% royalty fund does not meet the Court's own criteria of "common use and equal benefit of all the members." The only characteristic of the class is that it encompasses those Navajo Indians who reside within a political subdivision created by the white man—a county in the State of Utah.

There is no rationale for an equitable distribution of the royalties except on the basis of territory. Under the 1968 Amendment all of the royalties could be used, within the terms of the statute, for the benefit of white men and Indians who have no connection with the land which produces the royalties.

IV. THE COURT'S DECISION IGNORES THE UNCHALLENGED FINDINGS OF THE LOWER COURT

The Court relied on a report of the Senate Committee on Interior and Insular Affairs, S. Rep. No. 710, 90th Cong., 1st Sess. 2 (1967) that the 1933 Act created problems of interpretation and difficulty in defining the class. That report concerned legislation proposed by the Appellants herein who are statutory trustees for Appellees. It was prepared without the opportunity of Appellees to properly present their views to the Congress.

Any legitimate interpretation problems of the 1933 Act were resolved before 1967 by Judge Christensen in

Sakezzie v. Utah Indian Affairs Commission, 198 F. Supp. 218 (Utah 1961). Supplemental proceedings were brought, 215 F.Supp. 12 (1963), not because of further problems of interpretation but because the statutory trustees of Appellees who are defendants herein *ignored* the court. Those decrees were never appealed and became *res adjudicata*.

The lower court found directly contrary to the Senate report, to-wit:

> Plaintiffs and their ancestors for generations prior to the enactment of the 1933 Act and prior to the settlement of San Juan County by those they identify as "Anglo Americans" lived in the area known as the Aneth Extension as a definable group. During said time and until the present, they have farmed and grazed their livestock on said lands and have recognized and respected specific territorial boundaries between each other on the reserved lands and between themselves and "Anglo Americans" outside of said reservation.

The Court may rely on legislative history to interpret ambiguous legislation, but it should not use 1967 history to interpret a 1933 Act or to find facts contrary to those proved at the trial.

V. THE DECISION IS IN CONFLICT WITH PRIOR DECISIONS OF THE COURT

The Court relied upon *Gritts v. Fisher*, 224 U.S. 640, which is not controlling. In that case there was no question but that the lands were the property of the Cherokee Indian Tribe. By statute the land which was owned by the Cherokee Tribe as a community was distributed by allotment to the individual members thereof.

Congress then amended the statute to provide that the surplus tribal land, i.e., the tribal land remaining *after* each member had received his allotment, would be alloted to include those tribal members who were born after the time limitation imposed by the original act. It did not deprive individuals of their individual share of the land. The *Gritts* case does not support the action of the Court in the instant case because here the Court deprived the class of its present right to receive the benefits of the royalties by diluting their *present* interest in the funds by a ratio of ten to one and by permitting the fund to be used for the benefit of the white man as well as Indians.

Congress by statute may create or confirm a title in Indians (be it a tribe, band or community) as absolute as fee simple. What language could express clearer congressional intent that the 37½% royalty fund would be used for the benefit of Appellees than the language of the 1933 Act wherein it states that said funds shall be used ". . . for the benefit of the Indians residing thereon."

Appellees direct the Court to the cases decided by it more recently than the *Gritts* case, beginning with *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 which held that once an interest is given to or recognized in a group of Indians that interest cannot be diluted without just compensation. The principle was articulated in *United States v. Creek Nation*, 295 U.S. 103, 110, 55 S.Ct. 681, 684, 79 L.Ed. 1331:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to

> the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.'

See also the significant line of cases following *Creek Nation.*

CONCLUSION

Appellees respectfully assert that the precedent relied on by the Court is not in point, that a substantial body of law supports the contentions of Appellees and that a resolution of the issues consistent with long recognized standards of due process compel a hearing and opportunity for full argument on the merits.

Respectfully submitted,

Joseph S. Jones

Jack Lunt
800 Walker Bank Building
Salt Lake City, Utah 84111

Grant H. Bagley

Clifford L. Ashton
141 East 1st South
Salt Lake City, Utah 84111

Bryce E. Roe
340 East 4th South
Salt Lake City, Utah 84111
Attorneys for Appellees

CERTIFICATE

I hereby certify that I am counsel for the Appellees and Petitioners; that the above Petition is presented to the Court in good faith and not for delay.

JOSEPH S. JONES